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In The
Supreme Court of the United States

AMERICAN CHIROPRACTIC ASSOCIATION, INCORPORATED, a non-profit corporation, *et al.*,
Petitioners,

v.

TRIGON HEALTHCARE, INCORPORATED, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF *AMICUS CURIAE* OF NCMIC GROUP, INC., IN SUPPORT OF PETITIONERS

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BRIEF *AMICUS CURIAE* OF NCMIC GROUP, INC., IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS CURIAE

NCMIC Group, Inc. is a diversified insurance and financial services company.[1] The company was founded in 1946 as the original provider of professional liability insurance to doctors of chiropractic. The company's

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[1] Pursuant to Supreme Court Rule 37.6, NCMIC Group, Inc. states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the NCMIC Group, Inc. has made a monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2(a), the parties have provided their written consent to the timely filing of this amicus curiae brief. The written consents of the parties have been filed with the Clerk of Court pursuant to Supreme Court Rule 37.3.

flagship operation, NCMIC Insurance Company[2], insures over 35,000 doctors of chiropractic, or more than 50 percent of the profession.

As a company founded by chiropractors for chiropractors, NCMIC ("National Chiropractic Mutual Insurance Company") is a strategic partner for doctors of chiropractic. Indeed, to further advance and promote the profession, NCMIC has given more than $7 million for chiropractic research. NCMIC also sponsors business training for graduating students and malpractice risk management seminars, and has published information for all doctors of chiropractic.

This litigation raises serious questions for NCMIC Group, Inc.'s business partners, the doctors of chiropractic, and the clients they serve. Specifically, the question is whether the anti-trust laws allow the competitors of chiropractors to conspire with large health insurance companies to improperly interfere with the chiropractors' provision of effective and efficient services to their clients. If allowed, this improper interference will detrimentally impact the economic health of individual doctors of chiropractic, potentially causing them to cut costs by reducing or eliminating their professional malpractice insurance coverage, thereby directly impacting NCMIC's success as a business. In addition, if a significant number of doctors of chiropractic are unable to purchase liability coverage due to the improper interference, the pool of participating doctors of chiropractic may become actuarially insufficient to spread the risk of insurance coverage among participating doctors, making liability coverage unavailable to any doctors of chiropractic. Without the protection

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2 NCMIC Group, Inc. is a mutual holding company for NCMIC Insurance Company; NCMIC Finance Corporation (NFC); NCMIC Insurance Services (NIS); and Professional Solutions Insurance Company (PSIC).

afforded by liability coverage, patients will be unwilling to utilize doctors of chiropractic and the downward economic spiral of the profession would continue.

Similarly, NCMIC's future is tied to the growth of the profession. If competitors are able to conspire with insurance companies to deny new doctors of chiropractic a decent living, NCMIC's growth and prosperity is challenged.

In sum, NCMIC's past and future success is inextricably linked to the ability of doctors of chiropractic to compete for the provision of health care services free of any unlawful interference by their competitors.

INTRODUCTION AND SUMMARY OF ARGUMENT

The purpose of the Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (2004), is to protect the public from the failure of the market. *See Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993). Thus, out of concern for the public interest, the Sherman Act directs itself against conduct which tends to destroy competition itself. *See id.* In Sherman Act § 1, 15 U.S.C. § 1, Congress took particular aim at concerted activity, because such activity is fraught with anticompetitive risk. *See Copperweld Corporation v. Independence Tube Corporation*, 467 U.S. 752, 768-69 (1984). In particular, when two independent market forces combine to act as one for their common benefit, the concerted activity suddenly increases the economic power moving in one direction, which in turn increases the potential for competition to be unfairly squelched and consumers to be deprived of a good or service which would have otherwise been supported by the market. *See id.*

In this case, the Petitioners presented evidence to the trial court that two independent market forces, a major provider of health care services (representatives of 90% of the medical doctors in Virginia) and the largest private payor for health services in Virginia (Trigon Healthcare, Inc. and its affiliated entities), engaged in concerted activity aimed at interfering with the health care consumer's ability to receive services from doctors of chiropractic. The Fourth Circuit Court of Appeals erroneously concluded that this concerted activity was not prohibited by Sherman Act § 1 because, in its view, under the intracorporate immunity doctrine the medical doctors and the health insurance companies could not conspire. *American Chiropractic Association v. Trigon Healthcare, Inc.*, 367 F.3d 212 (4th Cir. 2004).

The Fourth Circuit's decision is contrary to this Court's prior decision in *Copperweld v. Independence Tube Corp.*, 467 U.S. 752 (1984). The Fourth Circuit's decision also represents one side of a current split among the Circuit Courts on this issue. The Petition for Writ of Certiorari should be granted to reverse the Fourth Circuit's deviation from this Court's precedent, resolve the Circuit Court split on this issue, and to protect consumers and chiropractic practitioners from respondents' concerted anti-competitive conduct that violates Sherman Act § 1.

ARGUMENT: REASONS FOR GRANTING WRIT OF CERTIORARI

I. The Court Should Grant the Writ of Certiorari Because the Circuit Court's Decision is Inconsistent with this Court's Decision in *Copperweld v. Independence Tube Corp.*, 467 U.S. 752 (1984).

In the seminal antitrust case of *Copperweld v. Independence Tube Corp.*, 467 U.S. 752 (1984), this Court provided the clearest guidance to date in distinguishing

between unilateral and concerted conduct in the context of whether corporations and their related entities or bodies are capable of conspiring under Sherman Act § 1. While *Copperweld* was limited to the question of whether corporations are capable of conspiring with their wholly-owned subsidiaries, the Court clarified its prior declarations regarding the so-called "intra-enterprise conspiracy doctrine." *Id.* at 767, 772-73. This doctrine, which had been divined from prior decisions of this Court, provided that Sherman Act § 1 liability is not foreclosed merely because a parent and its subsidiary are subject to common ownership. *Id.* at 759.

In *Copperweld*, the Court established the proper analysis for determining whether a corporation is capable of conspiring with a related entity. Specifically, the Court rejected any reliance upon the form of the corporation's structure, and instead adopted a more practical test emphasizing whether a "unity of interest" *always* exists between the conspiring parties. *Id.* at 771-72. In other words, the judgment must not be based upon the "garb" in which the related entity is clothed, but rather upon the realities of the arrangement. *Id.* at 773-74 (citing *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 360 (1933)).

In this case, the Petitioners presented evidence of concerted activity between Trigon, the largest private payor for health services in Virginia, and the members of the MCAP ("Managed Care Advisory Panel"), a "panel" composed primarily of representatives of 90% of the medical doctors in Virginia. Notably, the MCAP did not include a single representative from any non-medical doctor health care profession, including doctors of chiropractic. *See* Appendix at 1095a.

Purporting to apply the principles enunciated in *Copperweld*, the Fourth Circuit found that the MCAP and Trigon were incapable of conspiring under Sherman Act § 1 as there was a unity of interest between them. *American Chiropractic Assn.*, 367 F.3d at 224-25. This finding wrongly focused upon the garb in which the MCAP was clothed, while ignoring the realities of the arrangement. In its analysis, the Fourth Circuit specifically refused to consider the MCAP members' clear and obvious underlying motivations and economic interests in limiting its query to determining the members' interests as defined by their role on the MCAP. *Id.* The court stated:

> American Chiropractic is undoubtedly correct that medical doctors and insurance companies do not, generally speaking, share a unity of interest. That, however, is not the correct inquiry in cases applying the intracorporate immunity doctrine. Instead, we look to whether the medical doctors, in their role as members of the MCAP, share a unity of interest with Trigon that makes them corporate agents of Trigon.

Id. The Fourth Circuit went on to define the parties' common interest as "addressing clinical issues in a manner that would best serve its consumers, the plan enrollees," and find that the Petitioners' claim was precluded by the intracorporate immunity doctrine. *Id.* Importantly, the Fourth Circuit completely disregarded the MCAP members' more obvious and prevailing interests in protecting their constituencies' medical practices from competition.

The Fourth Circuit's interpretation of *Copperweld* sets a dangerous precedent as it favors form over substance by relying exclusively upon the existence of an artificial structure -- the panel -- to conclude that the members of the

panel had a unity of interest with Trigon. In doing so, the Fourth Circuit ignored the teachings of this Court to look beyond form and determine whether, in reality, the entities always shared a unity of interest. Under the Fourth Circuit's analysis, parties which do not usually share a unity of interest need only apply a minimal degree of aforethought to developing an artificial structure, in this case a "panel," to avoid the proscriptions of Sherman Act § 1. This outcome could not possibly have been the intent of this Court in *Copperweld*.

It is undisputed that the profession of medical doctors, often times aided by health insurers such as Trigon, has a longstanding and well-known history of unlawfully conspiring to destroy the practice of chiropractic medicine. *American Chiropractic Assn.*, 367 F.3d at 218-19 (citing *Wilk v. American Medical Association*, 895 F.2d 352, 371 (7th Cir. 1990)); *see also* Lori B. Andrews, *The Shadow Health Care System: Regulation of Alternative Health Care Providers* , 32 Hous. L. Rev. 1273, 1288-98 (1996) (discussing barriers to the use of alternative health care providers, including doctors of chiropractic, which have been erected by their main competitors, physicians). Medical doctors have a strong self-interest, with respect to their own medical practice, in how a major health insurer formulates recommended treatment guidelines and reimbursement levels. The medical doctors' interests unmistakably differ from those of health insurance companies such as Trigon. In the present case, Trigon's interests were to minimize expenses. By contrast, the medical doctors' interests were, and undoubtedly continue to be, linked to the profitability of their own medical practice. When considering these realities, it quickly becomes clear that the interests of the MCAP's members were divergent from the interests of Trigon. There was no "unity of interest" between these parties. Thus, the members of the MCAP and Trigon were capable of conspiring in violation of Sherman Act § 1.

This Court should grant the Writ of Certiorari in order to correct the Fourth Circuit's misapplication of this Court's decision in *Copperweld*.

II. The Court Should Grant the Writ of Certiorari in Order to Address a Conflict Among the Circuit Courts with Respect to the Scope of the Intracorporate Immunity Doctrine.

Since the *Copperweld* decision, the lower courts have struggled to determine the appropriate scope of the intracorporate immunity doctrine beyond the wholly-owned subsidiary context. *See Fraser v. Major League Soccer*, 284 F.3d 47, 56-59 (1st Cir. 2002). For example, in this case the Fourth Circuit relied heavily upon its prior decision in *Oksanen v. Page Memorial Hosp.*, 945 F.2d 696 (4th Cir. 1991), in determining that Trigon could not conspire with the MCAP or its members. *See American Chiropractic Assn.*, 367 F.3d at 223-25. In *Oksanen*, the Fourth Circuit held that under the intracorporate immunity doctrine a hospital could not conspire with non-employee medical doctors serving on the hospital's peer review committee. *Oksanen*, 945 F.2d 696. The Fourth Circuit's decision in *Oksanen*, while consistent with decisions from the Third and Seventh Circuits, is contrary to decisions from the First, Sixth, Ninth, and Eleventh Circuits which have found the same parties capable of conspiring in violation of Sherman Act § 1 under certain circumstances. *Compare Id.; Weiss v. York Hospital*, 745 F.2d 786 (3rd Cir. 1984); *Pudlo v. Adamski, Jr.*, 1993 U.S. App. LEXIS 20442 (7th Cir. 1993); with *The Podiatrist Association v. LaCruz Azul de Puerto Rico*, 332 F.3d 6 (1st Cir. 2003); *Nurse Midwifery Associates v. Hibbett*, 918 F.2d 605 (6th Cir. 1990); *Oltz v. St. Peter's Community Hospital*, 861 F.2d 1440 (9th Cir. 1988); *Bolt v. Halifax Hospital Medical Center*, 891 F.2d 810 (11th Cir. 1990). This Court's guidance is needed to resolve this conflict among the circuits.

The *Bolt*, 891 F.2d 810 (11th Cir. 1990), and *Oltz*, 861 F.2d 1440 (9th Cir. 1988), decisions are representative of the circuit court decisions finding that hospitals and their medical staff (vis-à-vis hospital committees) are capable of conspiring under section 1 of the Sherman Act. In *Bolt*, the Eleventh Circuit found that a hospital's medical review board could conspire with the hospital in acting against the interests of a doctor on the medical staff. 891 F.2d 810 (11th Cir. 1990). In that case, a committee of staff doctors presented a recommendation to the hospital that it place conditions upon the doctor's appointment to the medical staff, which was accepted by the hospital. *Id.* The Court found that the hospital and its medical staff, acting by way of the peer review committee, were separate entities capable of unlawful concerted conduct. *Id.* at 819. In so finding, the Court recognized the disparate interests of the hospital and its medical staff. Indeed, the Court specifically discussed the medical staff's interest in besting its economic competition, which included other doctors on the medical staff. *Id.* at 820. As such, the *Bolt* decision tacitly recognized the dangers to market competitiveness when countervailing interests combine under the purview of a committee, and act in concert against the interests of third parties. Importantly, under these circumstances members of the medical staff were treated as separate economic actors, and not as agents of the hospital. *Id.* at 819.

In *Oltz*, the Ninth Circuit provided a more thorough analysis of the issue. 861 F.2d 1440 (9th Cir. 1988). The *Oltz* case involved allegations that a hospital conspired with its MD anesthesiologists, including by way of actions taken on a hospital committee, against a nurse anesthesiologist working within the hospital. *Id.* The Court found that while the MD anesthesiologists may have been agents of the hospital for some purposes, their interests were not so unified as to find an agency relationship for all purposes. *Id.* at 1450. The Court stated that:

> The anesthesiologists were independent contractors pursuing their personal economic interests when they pressured St. Peters to eliminate Oltz as a direct competitor. Those interests were sufficiently independent so that the collaborated conduct between the anesthesiologists and St. Peter's coalesced economic power previously directed at disparate goals.

Id. The Court found an ability to conspire despite the MD anesthesiologists' inability to act against the nurse anesthesiologist (the hospital retained sole authority to terminate). *Id.*

The Fourth Circuit's decision in this case directly contradicts and is irreconcilable with the *Bolt* and *Oltz* decisions. Specifically, in *Bolt* and *Oltz*, the courts looked at the economic realities of the committee arrangement and recognized that the non-employee medical doctors had independent competitive interests which diverged from the interests of the hospital with respect to allowing competitors access to the marketplace. Thus, the medical doctors and hospitals remained separate entities capable of concerted conduct violating Sherman Act § 1, notwithstanding the medical doctors' participation in a committee created by the hospital.

By contrast, the Fourth Circuit's decision, relying on its prior decision in *Oksanen*, 945 F.2d 696 (4th Cir. 1991), ignored the economic realities of the situation by concluding that the non-employee medical doctors instantly assumed the same interest as Trigon when they were appointed to Trigon's "panel," the MCAP, and simultaneously lost all interest in limiting their own competitors' access to the marketplace. The Fourth Circuit simply held: "Because

Trigon established the MCAP to offer input on clinical issues faced by Trigon, the individual medical doctors, in their role as members of the MCAP, share the same interest as Trigon." *American Chiropractic Assn.*, 367 F.3d at 225.

In sum, there is a split of authority among the circuits as to whether non-employees automatically assume total unification of interest with a corporation simply by agreeing to sit on a panel or committee established by that corporation such that the individuals are thereafter incapable of conspiring with the corporation against third parties. This Court should grant the Petition for Writ of Certiorari in order to fully enforce the proscriptions of Sherman Act § 1, and to eliminate the circuit courts' inconsistent application of the intracorporate immunity doctrine after *Copperweld*.

III. The Court Should Grant the Writ of Certiorari Because the Challenged Conduct Harms the Public by Unfairly Depriving the Health Care Consumer of an Effective and Efficient Treatment for a Common Ailment.

Low back pain is one of the most prevalent and costly ailments in the United States. Indeed, studies indicate that most people report low back problems at some time in their lives. *See* Appendix at 813a. National statistics indicate a general yearly prevalence of low back pain among fifteen to twenty percent of the United States population. *See id.* According to one survey among working-age people, fifty percent admit to back symptoms each year. *See id.* Back symptoms, in fact, are the most common cause of disability for persons under age forty-five. *See id.* At any given time, about one percent of the United States population is chronically disabled because of back problems, and another one percent is temporarily disabled. *See id.*

In light of its prevalence, it is not surprising that the total cost to society of low back problems is substantial. For example, low back problems are the second most common symptomatic reason expressed by patients for office visits to primary care physicians, and they are the most common reason for office visits to orthopedic surgeons, neurosurgeons, and occupational medicine physicians. *See id.* Low back problems rank third among the reasons for surgical procedures. *See id.* Moreover, although medical costs are high, loss of time from work and disability payments for work-related low back problems can together cost up to three times as much as medical treatment. *See* App. at 813a-814a. Indeed, about two percent of the United States workforce has compensable back problems each year. *See* App. at 814a. Various estimates of the total annual societal cost of back pain in the United States range from $20-$50 billion. *See id.*

Because of the magnitude of the health and economic impact of low back pain in our society, in 1994 the U.S. Department of Health and Human Services Public Health Service Agency for Health Care Policy and Research ("AHCPR") convened a 23-member multi-disciplinary private sector panel to develop a guideline for the evaluation and treatment of acute low back problems in adults. *See* App. at 808a. The panel employed explicit, science-based methods and expert clinical judgment to develop specific statements on acute low back problems in adults. *See* App. at 801a. The panel's recommendations are primarily based on the published scientific literature, but when the scientific literature was incomplete or inconsistent in a particular area, the recommendations reflect the professional judgment of panel members and consultants. *See id.* It was the panel's belief that the AHCPR-assisted clinical guidelines would make positive contributions to the quality of care in the United States. The AHCPR

encouraged practitioners and patients to use the information provided in the clinical practice guideline. *See* App. at 802a.

One of the principal conclusions reached by the AHCPR panel was that relief of discomfort can be accomplished most safely with non-prescription medication and/or spinal manipulation. *See* App. at 802a-803a. Specifically, the panel concluded that for patients with acute low back symptoms without radiculopathy the scientific evidence suggests spinal manipulation is effective in reducing pain and perhaps speeding recovery within the first month of symptoms. *See* App. at 861a. The panel defined manipulation as manual therapy in which loads are applied to the spine using short or long lever methods. *See* App. at 859a. Doctors of chiropractic provide approximately 90% of this type of spinal manipulation. *See* App. at 1040a-i.

In sum, the AHCPR panel recognized that spinal manipulation performed by doctors of chiropractic is one of the most effective and efficient treatment for one of the most prevalent and costly ailments in our society. This report, which was released in late 1994, *see* App. 1071a, was immediately recognized as a validation of the services provided by doctors of chiropractic and a potential boon to their business. *See* App. 1072a-76a.

Unwilling to allow the AHCPR panel report to freely influence the market for chiropractic services, the medical doctors on Trigon's panel adopted and endorsed low back pain treatment guidelines within months of the release of the AHCPR panel report which were inconsistent with the AHCPR's guidelines and which greatly restricted the referral of patients from primary care physicians to doctors of chiropractic in Virginia. Trigon approved these treatment guidelines and disseminated them to virtually every medical doctor in the state. In doing so, tens of thousands of

patients were improperly denied access to the most effective and efficient treatment available for their condition. *See* App. 1134a-35a. This interference not only increased the cost of treatment to the individual patients, but exacerbated the costs to society associated with their back problems. If similar conduct is allowed to go unchecked across the country, hundreds of thousands of patients will be improperly denied access to one of the most effective and efficient treatments for low back pain and the societal cost will increase exponentially.

Because seventy-five to ninety percent of health insurance coverage is purchased by employers on a group basis, consumers often do not have the ability to choose among health plans. Moreover, there is no incentive for employers to exert pressure on health plans to fairly cover alternative providers such as doctors of chiropractic. *See* Lori B. Andrews, *supra* at 1308-09. Therefore, if the health plans chosen by consumers' employers conspire with medical doctors to limit access to doctors of chiropractic, consumers will either have to pay for the alternative care out of their own pockets or consumers will be forced to acquiesce in a mode of care which is potentially less effective, more expensive, and not their first choice.

Ultimately, society as a whole is the loser with respect to healthcare costs, personal liability, and productivity losses when the best modality for each patient is not available due to improper interference with the market system by major players such as medical doctors and health insurers. As the Seventh Circuit recognized in *Wilk*, "It is anticompetitive and it raises costs to interfere with the consumer's free choice to take the product of his liking." 895 F.2d 352, 360 (7th Cir. 1990)(citing *Wilk v. American Medical Association*, 671 F. Supp. 1465, 1478-79 (N.D. Ill. 1987)). Accordingly, when two major market actors combine to place restraints on chiropractors'

competitive position in providing treatment for back pain and injury, it is to the detriment of the patients and their households, businesses and governments that pay for health insurance, businesses that suffer financial and productivity losses when workers are injured, the chiropractic profession, and thus virtually all of society. *See* App. at 1127a.

Two segments of society -- patients and employers -- are especially injured by a failure of the courts to enforce the Sherman Act § 1 with respect to the concerted efforts of medical doctors and health insurance companies to improperly interfere with the availability of alternative treatment modalities, such as chiropractic care. For example, patients incur some or all of the following impacts: higher out-of-pocket costs, treatment by types of providers not their first choice, possibly poorer treatment results, larger income losses from work absence, additional costs on family members for providing care during the extended work absences of the primary wage earners, and other impacts, psychological and social. Further, the use of less effective and more expensive treatments for back pain raises the cost of insurance for everyone, including the families or individuals who purchase their insurance themselves. *See* App. at 1126a; *see also* Rebecca Berg, *HMO Exclusion of Chiropractors*, 66 S. Cal. L. Rev. 807, 819 (1993)(recognizing that cost-comparison studies indicate that chiropractic care is a lower-cost option for numerous musculoskeletal ailments than a treatment regimen involving physicians).

Employers are hurt in at least two ways. First, employers represent the largest purchasers of health insurance and the higher insurance costs resulting from bias in favor of medical, surgical, and hospital care relative to chiropractic care are largely paid for by employers who provide group health insurance plans. Additionally, the proven superior efficacy in terms of functional mobility of chiropractic treatment of back injuries means that workers

denied care will impose on their employers higher workers' compensation costs and greater productivity losses from work absences. *See* App. at 1126a-1127a.

In light of the detrimental impact of the challenged conduct on society, this Court should review the Fourth Circuit's erroneous application of the intracorporate immunity doctrine as it applies to the concerted, anti-competitive actions of health insurers and the non-employee medical doctors serving on their panels or committees.

IV. The Court Should Grant the Writ of Certiorari Because the Challenged Conduct Harms the Public Interest by Unfairly Depriving Doctors of Chiropractic of the Level of Compensation that the Market Would Otherwise Provide.

Reductions in the number of patients seen by doctors of chiropractic due to the concerted efforts of health insurers and medical doctors necessarily result in economic loss to the excluded providers. *See* App. at 1125a. Indeed, Petitioners presented evidence to the trial court establishing that the deterred demand resulting from the erroneous guidelines developed by the medical doctors and Trigon cost Virginia chiropractors $65,492,356 over a six year period. *See* App. 1137a. This sum constituted an eleven percent reduction in total payments made to Virginia chiropractors from Trigon during the relevant period. *See id.* If similar conduct is allowed to go on unchecked across the country, the cost to doctors of chiropractic and their communities will be substantial.

If medical doctors are successful in reducing the income for doctors of chiropractic through their participation on insurance company panels, doctors of chiropractic may be forced to reduce costs or cut corners which will detrimentally affect patient care. Indeed, some doctors of chiropractic may be forced out of the profession.

Likewise, if chiropractors' income is artificially stifled by the type of concerted activity at issue in this case, students may decide that the chiropractic profession is not a viable career alternative.

If the number of doctors of chiropractic is reduced in response to this anticompetitive conduct, many patients will be denied their first choice for health care services. This result would represent a fundamental failure of the antitrust system. Antitrust scholars contend that the antitrust laws are "intended to ensure that the market place remains competitive so that worthwhile options are produced and made available to consumers, and this range of options is not to be significantly impaired or distorted by anticompetitive practices." Robert H. Lande, *Consumer Choice as the Ultimate Goal of Antitrust*, 62 U. Pitt. L. Rev. 503 (2001)(noting that the market should respond to the aggregate signals of consumer demand, not the preferences of individual businesses); *see also* Rebecca Berg, *supra* at 819 (suggesting that consumer welfare in the antitrust context recognizes that consumers should be able to choose their preferred products or services, rather than having their choices made by outsiders)(citing *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 459 (1986)).

The evidence is overwhelming that consumer demand for alternative health care services, such as chiropractic treatment, continues to rise. *See* Lori B. Andrews, *supra* at 1273-83. Consumers are seeking services from alternative providers rather than medical doctors for a variety reasons, including greater accessibility, lower costs, more personal attention, better effectiveness, and less reliance on prescription medications and therefore less exposure to the side effects associated therewith. *See, e.g.*, Lori B. Andrews, *supra* at 1276-83. If medical doctors and insurance companies are allowed to dictate whether alternative health care options remain viable going forward

irrespective of consumer demand, the anti-trust laws will have failed to fulfill one of their principal missions.

In addition, if doctors of chiropractic are forced to reduce costs or leave the profession entirely, and/or students are deterred from entering the profession in the first instance, there will be other significant, negative impacts on the broader community, such as: (1) the loss of employment for individuals working in chiropractic offices; (2) the loss of employment for individuals working at chiropractic schools; (3) the economic and social loss to a community if chiropractic schools are forced to close or consolidate; (4) the detrimental effect on the economic health of vendors to the profession, such as insurance companies, x-ray companies, table manufacturers, publications, vitamins, braces, pillows, etc.; and (5) the costs discussed in section III, supra, related to the loss of an effective and efficient health care alternative.

This Court should grant the Petition for Writ of Certiorari because of the harm to our society associated with unfairly depriving doctors of chiropractic of the level of compensation that the market would provide but for the illegal conspiracy.

CONCLUSION

For the foregoing reasons, *Amicus Curiae*, NCMIC Group, Inc., urge the Court to grant the Petition for Writ of Certiorari in order to review the Fourth Circuit's erroneous decision.

Respectfully submitted,

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